89-1660

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

PETER J. CASTIGLIA, [redacted]

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

[redacted] PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETER J. CASTIGLIA

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Questions Presented

1. Where the substantive language of the statute under which Petitioner was convicted has not been defined or explained, by this or any other Court, is it appropriate for this Court to examine and interpret that statute?

2. Where there is disagreement among the Circuit Courts of Appeals as to the conduct which is proscribed by the statute, is it appropriate for this Court to settle that disagreement?

3. Where there is a lack of uniformity of application of the statute within the circuit wherein Petitioner was convicted, is it appropriate for this Court to examine the matter?

4. Where it is apparent that the decision of the Court below is inconsistent with its own precedent, is it appropriate for this Court to review Petitioner's conviction?

Parties to the Proceeding

Co-Defendants, at the trial, were PETER J. CASTIGLIA, JACK LIFFITON, ANTHONY SANTIAGO and RICHARD TOCHA.

TOCHA was acquitted of all charges, by the jury.

Co-Defendants/Appellants, on the appeal to the Second Circuit Court of Appeals were CASTIGLIA, LIFFITON and SANTIAGO.

Separate petitions for writ of certiorari will be presented to this Court by LIFFITON and SANTIAGO. This petition for writ of certiorari is presented on behalf of PETER J. CASTIGLIA.

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IN THE

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No. _____

PETER J. CASTIGLIA, JACK LIFFITON
and ANTHONY SANTIAGO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETER J. CASTIGLIA

Jurisdictional Statement

Petitioner herein was indicted on May 23, 1985, by a United States Grand Jury for the Western District of New York, charged with Conspiracy (Title 18 U.S.C. §371), Misapplication of Bank Funds, in connection with a $580,000 loan (Title 18 U.S.C. §656), Making False Entries in Bank Records, in connection with that loan (Title 18 U.S.C. §1005), Misapplication of Bank Funds, in

connection with a $400,000 loan (Title 18 U.S.C. §656), Making False Entries in Bank Records, in connection with that loan (Title 18 U.S.C. §1005), and two additional counts of Making False Entries in Bank Records, in connection with the bank's internal Code of Conduct Questionnaires (Title 18 U.S.C. §1005). A jury verdict, finding petitioner guilty of those crimes, was returned on September 23, 1988. Judgment of conviction was entered on April 17, 1989.

On appeal, to the United States Court of Appeals for the Second Circuit, the judgment was affirmed, on January 17, 1990, Judge Winter dissenting in part. Petition for re-hearing was denied on March 20, 1990. Re-hearing *in banc* was denied on March 23, 1990.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Statute Involved

Although Petitioner was convicted under several statutes, all charges are interdependent upon the convictions for misapplication of bank funds, in violation of Title 18 U.S.C. §656:

> §656. Theft, embezzlement, or misapplication by bank officer or employee
>
> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody and care of such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both;

Statement of the Case

The facts of the instant matter, stated in a light most favorable to the Government, are as follows:

Peter J. Castiglia, Vice President and Senior Commercial Lending Officer for the Bank of New York, made a $580,000 demand loan, on September 23, 1981, to Anthony Santiago, a long standing bank customer who, the Government conceded, had the financial ability to repay the loan.

Interest on the loan was pre-paid; the proceeds, $505,000, were credited to Santiago's checking account. Those proceeds traveled, circuitously, through Castiglia's attorney, to Geneva Lands, Inc., a corporation in which Castiglia was sole shareholder of record, and Jack Liffiton and Liffiton's business interests, and Liffiton's wife, eventually benefitting Liffiton and Castiglia.

Almost a year later, on September 16, 1982, Castliglia made a $400,000 loan to Hallaway Properties, Inc., through its president, Richard Tocha. The corporation and the individual were fully capable of repaying the loan, which was collateralized by an asset worth more than $5,000,000.

The proceeds of that $400,000 loan went to Santiago, who directed that it be paid to the Bank of New York to pay down the $580,000 loan. The remaining $180,000, and interest, were paid by Santiago.

Interest on the $400,000 loan was paid by Tocha/Hallaway Properties, Inc.; Castiglia reimbursed Tocha for some of those interest payments; the bank refused to accept some payments on the loan. Hallaway Properties, Inc. was eventually held to be in default on the loan.

There can be no question that the two loans made by Castiglia were not "sham" loans, in the context of a fictitious borrower or the use of a borrower's name without his knowledge. Nor was there a serious issue of the ability of the borrowers to repay. The $400,000 loan was heavily secured, and the corporation and its president possessed assets well in excess of the amount of the loan.* With reference to the $580,000 loan, the Government stipulated that Santiago was able to repay the loan.

There remained, then, an issue of whether Santiago and Tocha lacked the intent to repay the loan.

The Government proof, of Tocha's lack of intent to repay, was that his personal liability on the loan was small, that he was reimbursed by Castiglia for interest payments made, and that he told an F.B.I. agent that he was assured that he would not have to repay. Tocha denied making such a statement and pointed to interest payments that he made, independently of Castiglia. Again, Tocha was acquitted of all charges, *i.e.*, conspiracy, aiding and abetting misapplication, aiding and abetting false entries.

The Government proof of Santiago's lack of intent to repay was circumstantial: his failure to record the loans, from Bank of New York and to Geneva Lands, Inc. (and/or Castiglia) on his books or financial statement, his failure to take a tax deduction for interest paid, and the obvious alteration of his books to reflect that monies were owing from Geneva Lands, Inc., rather than from Castiglia. Additionally, the Government sought to show that belated documentation and collateralization of Santiago's $180,000 loan to Geneva Lands, Inc. was a

* Tocha was acquitted of all charges in connection with that loan.

"cover-up" of the initial transaction. Counter to that was defense proof that Santiago paid in excess of $87,000 in interest on the loan and that the entire loan was repaid. Additionally, the defense contended that the promissory note, regular in all respects, unequivocally obligated Santiago to repay and, by its terms, put his Bank of New York accounts, previously posted collateral, and any of his assets at risk and within the easy reach of the Bank of New York. Castiglia, in his trial testimony, denied that Santiago had been assured of lack of obligation to repay; there was no testimony that such assurance had been given.

The last remaining theory of criminal misapplication was that the proceeds of the loans benefitted Castiglia, an officer of the bank.

The other crimes of which Castiglia was convicted, *i.e.*, conspiracy (to misapply) and making false entries in bank records (showing Santiago and Hallaway Properties, Inc., respectively, as obligors on the two notes) depend entirely on the substantive counts of misapplication: if a misapplication did not occur, there was no conspiracy to misapply, the entries on bank records were not false, and, *vis-a-vis* the counts relating to the bank's Code of Conduct Questionnaire, Castiglia's personal interests did not affect his ability to represent the Bank's interest fairly and impartially.

On appeal, to the United States Court of Appeals for the Second Circuit, Petitioner's judgment of conviction was affirmed, in an opinion filed on January 17, 1990 (Appendix A). Judge Winter concurred in part and dissented in part. The dissent addressed the convictions for conspiracy, misapplication of bank funds, the making of false entries in bank records concerning the loans in

question and (the Co-Defendants') aiding and abetting the misapplication and false entries. That dissent was based upon the indistinguishability of the instant case from a prior, definitive, decision of that same Court (*United States v. Docherty* (2d. Cir., 1972) 468 F2d 989).

Application for re-hearing was denied, in an opinion filed on March 20, 1990, citing 12 U.S.C. §375b (1988).* The suggestion for re-hearing *in banc* was rejected, in an order filed on March 23, 1990 (Appendices B & C).

* The statute, 12 U.S.C. §357b (1988) places a limitation on the amount of money which a bank may loan to one of its officers. It is inapposite to any issue in this case; it was never cited nor discussed at any stage of the proceedings. It post-dates the conduct in this case by seven years and the indictment by three years.

ARGUMENT

It Is Necessary And Desirable That This Court Review, Interpret And Explain The Statute Under Which The Petitioner Stands Convicted.

The Petitioner herein seeks review by the Court of his convictions, based upon and proceeding from alleged violations of Title 18 U.S.C. §656, on the grounds that the statute is unconstitutionally vague in its use of the term "willful misapplication". That term, and the conduct constituting willful misapplication, has not been defined by this Court. To the extent that it has been addressed by lower federal courts, there is disagreement as to its meaning. Its accepted meaning in the Second Circuit has not been applied to the instant case.

A. The Statute Under Which Petitioner Was Convicted Is Impermissably Vague.

All of Petitioner's convictions stem from willful misapplication of bank funds. The words, "willfully misapplied" were found, by this Court, not to describe any offense at common law, to have no settled technical meaning, and to be insufficient to set forth, fully and clearly, every element of the offense charged (*United States v. Britton*, 107 U.S. 655, 2 S.Ct. 512).

In the more than one hundred years following that holding, this Court has not defined, with reasonable precision, those nebulous words (*cf. Kennedy v. United States*, 361 U.S. 875, 80 S.Ct. 138). Indictments are filed, and convictions follow, with no definitive statement of the conduct which will make an application an unlawful one.

The federal Courts of Appeals, in those intervening years, have averred that misapplication is no longer a vague term (*United States v. Fortunato*, (2d Cir., 1968) 402 F2d 79, 81), that it has acquired a technical meaning sufficient in and of itself to charge an individual with a crime (*United States v. Moraites* (3d Cir., 1972) 456 F2d 435; *United States v. Mann* (5th Cir., 1975) 517 F2d 259). Their explanation of that technical meaning belies that averment:

> —willful misapplication means criminal misapplication rather than a mere act of maladministration (*United States v. Moraites, supra; United States v. Meyer* (5th Cir. 1959) 266 F2d 747; *Kennedy v. United States, supra*);
>
> —willfully misapplies does not connote a precise or specific form of conduct (*United States v. Krepps* (3d Cir., 1979) 605 F2d 101);
>
> —willful misapplication is "flexible" in its meaning; it can be described "loosely" (*United States v. Krepps, supra*);
>
> —misapplication is something other than embezzlement or abstraction; it is something improper and unjustified; it is something more than bad judgment or maladministration (*United States v. Wilson* (5th Cir., 1974) 500 F2d 715).

It is respectfully submitted that there exists no settled, technical, meaning of the term in issue. In the absence of such definition, defendants cannot know the conduct that is proscribed and, if indicted, are not apprised, ". . . with reasonable certainty, of the nature of the accusation against him." (*United States v. Trotta* (2d Cir., 1975) 525 F2d 1096, 1099). A definitive statement by this Court is needed.

B. There Is Disagreement Among the Circuits Concerning the Conduct Proscribed by §656.

Despite the absence of a definition or explanation of the concept of willful misapplication, convictions therefor have been entered, and affirmed. The strongest indication of the ambiguity that exists is the disagreement, among the Circuit Courts of Appeals, as to the conduct which constitutes misapplication.

It is generally accepted that the making of a loan to a fictitious person, to a real person who is unaware of a loan application made in his name, or to one who is known to be financially unable to repay the loan, constitutes violation of the statute (*United States v. Gens* (1st Cir., 1974) 493 F2d 216; *United States v. Krepps, supra; United States v. Fortunato, supra*). Those situations do not exist in the instant case. The disagreement among jurisdictions lies in the situation where a loan which benefits a person other than the named borrower: that may or may not be criminal misapplication, depending on the status, or identity, of the beneficiary.

Within the jurisdiction of the first circuit, it is not a crime for a bank officer to make a loan, to a financially secure borrower, even if that bank officer is the beneficiary of the loan (*United States v. Gens, supra*). In the third, seventh, ninth and tenth circuits, that same scenario constitutes a crime, because the beneficiary is a bank officer (*United States v. Gallagher,* (3d Cir., 1978) 576 F2d 1028; *United States v. Krepps, supra; United States v. Shively,* (7th Cir., 1983) 715 F2d 260; *Hargreaves v. United States,* (9th Cir., 1935) 75 F2d 68; *United States v. Cooper* (10th Cir., 1972) 464 F2d 648). The situation is even more confusing in the second circuit, where precedent is divided (*cf. United States v. Fortunato, supra; United States v. Docherty, supra*).

The state of the law cannot be such that conduct is criminal or non-criminal, based on geographic circumstances. Fundamental fairness and the administration of justice require the intervention of this Court.

C. The Decision Below Is At Variance With An Earlier Decision of the Court.

Further complicating an already confusing situation, precedential authority of the circuit was not followed in the instant case. The argument of the appeal and the opinion in the decision here sought to be reviewed was focused exclusively on the Second Circuit's decision in *United States v. Docherty, supra.* That case involved a multitude of loans made by a bank officer to his friend. All of the proceeds of the loans went to the banker; the payment books were retained by the banker; interest and principal payments were made directly by the banker. The Second Circuit Court of Appeals reversed the conviction of the borrower*, on the ground that he had put his credit on the line, in signing loan documents, and had the financial ability to repay, notwithstanding the fact that the proceeds of the loan benefitted the banker. That case is indistinguishable, factually and legally, from the instant case.

Compounding the anomaly of the instant case is the fact that Tocha, the "abettor" of one of the misapplications (and part of a single transaction) was acquitted, even while Castiglia was found guilty of that same misapplication.

This one case, involving disagreement among the circuits, conflict within a circuit, and inconsistency within the case, cries for the attention of this Court.

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* The bank officer did not stand trial and could not appeal his convictions on other related charges.

Conclusion

The instant case involves a statute which is frequently invoked, throughout the country. The meaning of the statute is not apparent on its face and, despite judicial statements that its terms carry an accepted meaning, that meaning has not been satisfactorily articulated by any court. The statute is so ambiguous as to permit and prohibit identical conduct, in different jurisdictions. It is so little understood as to cause the appellate court to reach opposite conclusions of law under precisely similar factual situations.

The Instant Application For
Writ of Certiorari
Should Be Granted

Dated: Buffalo, New York
April 16, 1990

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, January 17, 1990.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 327, 328, 558—August Term, 1989

(Argued November 8, 1989 Decided January 17, 1990)

Docket Nos. 89-1207, 89-1209, 89-1216

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER J. CASTIGLIA, JACK LIFFITON AND ANTHONY SANTIAGO,

Defendants-Appellants.

B e f o r e :

KAUFMAN, TIMBERS AND WINTER,

Circuit Judges.

Appeal from judgments of the United States District Court for the Western District of New York (Elfvin, *J.*) convicting defendants, after a jury trial, of conspiracy, misapplication of bank funds, and making false entries in bank records. Appellant Jack Liffiton was also convicted of perjury.

Affirmed.

Judge Winter concurs in part and dissents in part in a separate opinion.

JUDITH BLAKE MANZELLA, Buffalo, New York (Edward C. Cosgrove, Buffalo, New York, of counsel), *for Defendant-Appellant Peter Castiglia.*

CHARLES H. DOUGHERTY, Buffalo, New York (Albrecht, Maguire, Heffern & Gregg, Buffalo, New York, of counsel), *for Defendant-Appellant Anthony Santiago.*

JACK D. LIFFITON, Getzville, New York, *pro se.*

GRETCHEN L. WYLEGALA, Assistant United States Attorney, Buffalo, New York (Dennis C. Vacco, United States Attorney for the Western District of New York, Denise E. O'Donnell, Susan M. Barbour, Assistant United States Attorneys, Buffalo, New York, of counsel), *for Appellee.*

KAUFMAN, *Circuit Judge*:

This case requires us to decide whether a bank officer abused his control of the bank's money—through a series

of allegedly sham loans that appellants portray as innocent creative financing—to the point of violating the law.

Peter Castiglia, the bank officer, Jack Liffiton, and Anthony Santiago appeal from judgments of conviction entered in the United States District Court for the Western District of New York after a jury trial before Judge Elfvin. Appellants' primary contention is that the Government has stretched the statute prohibiting "misapplication" of bank funds by a bank officer, 18 U.S.C. § 656, beyond its legitimate contours, thereby criminalizing perfectly proper business transactions. We are asked to rule that no "misapplication" occurred and that this prosecution represents an overzealous use of a criminal statute in an inappropriate situation. We decline to do so, since persuasive proof at trial established that the defendants carried out a complex and audacious scheme to obtain bank funds in a manner long recognized as misapplication. Because we also reject appellants' other challenges, we affirm the convictions.

The jury found that Castiglia, as Senior Commercial Lending Officer at the Buffalo branch of the Bank of New York ("BONY"), orchestrated a duet of sham loans with the assistance of named borrowers Santiago and Tocha, both of whom were assured that they would not be responsible for repayment of the loans. The real beneficiaries of the loan proceeds were Castiglia, his corporate alter ego (Geneva Lands, Inc.), and a friend (Liffiton)—none of whom were eligible to receive these loans directly without special authorization from Castiglia's superiors. Since appellants challenge the sufficiency of the evidence supporting their convictions, we begin with an abbreviated summary of what the jury could have found, viewing the evidence in the light most favorable to the Government, as

we are required. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

In September 1981, as we already noted, Castiglia was Senior Commercial Lending Officer at BONY, an FDIC-insured institution. BONY's internal regulations restricted Castiglia's authority. He could not make personal or commercial loans to himself without bank approval,[1] nor could he authorize more than one million dollars in aggregate unsecured loans to any one borrower. He was required to disclose any outside business or partnership relationships, particularly any such relationships with bank customers.

Despite these rules, Castiglia failed to report to BONY his exclusive ownership of Geneva Lands, a real estate holding company. Castiglia and Geneva Lands were as one. He borrowed money from other banks in the corporate name for personal purposes, and listed himself as the sole shareholder on the corporate tax returns.

In September 1981, Castiglia arranged for a $580,000 BONY loan to be issued in Anthony Santiago's name. Utilizing an attorney escrow account, Castiglia directed the funnelling of these funds through a series of circuitous transactions. By mid-November $505,000 had been laundered into various accounts belonging to Castiglia, Geneva Lands, and Liffiton.[2] Liffiton, whose unsecured BONY loans already exceeded BONY's one million dollar limit, received four checks totalling $188,000. Although Castiglia subsequently completed several bank Code of

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1 12 U.S.C. § 375a limits the instances in which a bank may extend credit to its officers and requires prompt reporting to the board of directors of any such loan.

2 $71,443.29 in prepaid interest was held by the bank. Santiago retained over $3,500.

Conduct Questionnaires, he failed to disclose his interest in Geneva Lands and the $580,000 loan that had benefitted him, his company, and Liffiton.

Appellants claim that Santiago recognized his obligation to repay the $580,000 and simply reloaned the principal. Santiago, however, did not enter the loan on his books. He merely instructed his bookkeeper to put a copy of the loan note in Castiglia's file. As a precaution against Castiglia's inability to repay the loan in the event of death, Santiago expected to be named beneficiary of a $580,000 insurance policy on Castiglia's life. Even though his substantial interest payment entitled him to a large tax deduction, Santiago's accountants were not informed of the loan. Nor did he repay the loan when it became due in June 1982. Instead, Castiglia arranged for it to be renewed.

Upon learning that Geneva Lands was under federal investigation, Castiglia immediately arranged to pay off the $580,000 debt. Within 48 hours, he convinced his friend Richard Tocha to borrow $400,000 from BONY, and applied this sum to the outstanding loan. The remaining $180,000 balance was exchanged for a demand note in Santiago's name. Castiglia then arranged with Santiago to retire the $180,000 loan by selling stock that BONY held as collateral on another debt, putting the bank at risk.

When Santiago's accountant learned of the original loan, after Castiglia's resignation from the bank, Santiago explained that he borrowed the money for Castiglia, who handled all the transactions and was responsible for repayment of the loan. Concerned about the lack of loan documentation and Castiglia's imminent surgery, Santiago's accountant obtained from Castiglia a personal promissory note for $180,000. Following surgery, however, Castiglia

substituted Geneva Lands as the obligor on this note and conveyed an explanation to Santiago's attorney and accountant which concealed his personal interest in the loan. Santiago adopted this characterization.

In an interview with the FBI, Tocha echoed Santiago, claiming that he was assured upon signing the $400,000 note that he would not be called upon to pay the principal or interest.[3] Both Santiago and Tocha looked to Castiglia for the interest payments. Santiago instructed his bookkeeper to call Castiglia if interest payments were late on the $180,000 loan. Tocha added the interest due on the $400,000 loan to bills sent to Castiglia for construction work performed by Tocha.

Despite a frantic effort to conceal the convoluted transactions—including the alteration of records and an attempt by Liffiton to induce Santiago to shield Castiglia with false testimony—Castiglia, Liffiton, and Santiago were convicted of conspiracy, 18 U.S.C. § 371, and a variety of substantive offenses linked to the misapplication of funds.[4] Only Tocha was acquitted of all charges. While

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3 Tocha recanted at trial, denying he made such a statement.

4 Specifically, Castiglia was convicted on two counts of misapplication of bank funds. 18 U.S.C. § 656. Liffiton and Santiago were convicted of aiding and abetting the $580,000 misapplication. 18 U.S.C. § 2. Castiglia was convicted of making, and Santiago with aiding and abetting the making of, false entries in bank records for the $580,000 loan. 18 U.S.C. §§ 1005, 2. Castiglia was convicted of the same offense with respect to the $400,000 loan, and for false entries on the bank Code of Conduct Questionnaires. Liffiton was also convicted of perjury before the grand jury. 18 U.S.C. § 1623. Judgments of conviction were entered for Castiglia and Liffiton on April 17, 1989, and for Santiago on May 1, 1989.

Castiglia was sentenced to 4 concurrent one year terms of imprisonment for conspiracy, two false entries, and the $580,000 misapplication. He also was sentenced to two concurrent one year terms for the $400,000 misapplication and false entry. Liffiton was sentenced to con-

appellants raise a multitude of contentions, we shall discuss in some detail their central claim that no "misapplication" occurred.

An officer of a federally-insured bank who "embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds, or credits" of the bank with the intent to injure, defraud or deceive that bank commits a criminal misapplication. 18 U.S.C. § 656; *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972). Castiglia was an officer of BONY, a federally-insured institution. Thus, the only issue before us is whether Castiglia's conduct amounts to willful misapplication.

Appellants contend that we are precluded from finding misapplication because Tocha and Santiago were financially able to repay their loans and recognized their legal obligations to do so. Their argument purportedly rests on our decision in *United States v. Docherty* and finds support in the First Circuit's opinion in *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974). In *Docherty* we held that there was no misapplication where the borrower had ample resources and "knew he was putting his own credit on the line." 468 F.2d at 995. *Gens* held that "where the named debtor is both financially capable and fully understands that it is his responsibility to repay, a loan to him cannot—absent other circumstances—properly be characterized as sham or dummy . . . ." 493 F.2d at 222.

It appears that both Santiago and Tocha had the resources to pay the loans and had executed all the relevant documents. Accordingly, Appellants assert that this

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current one year terms for conspiracy and misapplication with a consecutive year for perjury. Santiago was sentenced to three years probation and a $7,500 fine. Execution of all sentences was stayed during appeal.

settles the issue. However, this contention ignores one long recognized category of misapplication:

> cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds: in other words where the debtor allowed only his name to be used, enabling the bank officials to grant a *de facto* loan to a third party to whom the bank was unwilling to grant a formal loan.

Id.; *see also United States v. Cleary*, 565 F.2d 43, 47 (2d Cir. 1977) (misapplication occurs where bank official assures named debtor he would not be called upon to repay), *cert. denied*, 435 U.S. 915 (1978). Such a formally executed loan "could be characterized as 'sham' or 'dummy' . . . , because there was little likelihood or expectation that the named debtor would repay." *Gens*, 493 F.2d at 222.

The key issue is whether the named borrowers fully understood and recognized their obligations to repay. "[L]oans of this character are improper only if the lending officer had no reason to expect that the named debtor would repay them; *e.g.*, where the officer knew that the named debtor was fictitious, had not authorized the use of his name, or was incapable of repaying the loan, or where the bank official assured the named debtor that he would not be called upon to repay." *Cleary*, 565 F.2d at 47 (*citing Gens*, 493 F.2d at 221-23). Since *Gens* accurately defines misapplication to include situations where the bank official assured the named borrower that he would not be responsible for repayment—as all appellants concede—it necessarily follows that a signature on loan documents does not conclusively establish an intent to

repay. Intent must be interpreted in light of the evidence that the bank official assured the named borrower that he would not be looked to for repayment because the officer would repay. Where such evidence is persuasive, misapplication has been established.

For example, in *Gens* the First Circuit reversed the convictions of nominee borrowers who recognized their repayment obligations, but remanded the one count involving a wealthy individual who signed his note with the understanding that he personally would not have to repay the loan, barring some "catastrophe." 493 F.2d at 220, 223. *See also United States v. King*, 484 F.2d 924, 926-27 (10th Cir. 1973) (nominee borrower signed note with the understanding that bank official would actually repay loan), *cert. denied*, 416 U.S. 904 (1974); *United States v. Moraites*, 456 F.2d 435, 438 (3d Cir.) (nominee borrower signed notes after bank officer assured it it would not have any obligation to repay), *cert. denied*, 409 U.S. 891 (1972). Nothing in *Docherty* suggests that such assurances were extended to the nominee borrower. The bank officer only "requested that Docherty borrow [money] and reloan it to him," apparently without making the additional representation that he would not be looked to for repayment. 468 F.2d at 991.

In the instant case, the record amply supports the conclusion that Castiglia assured each named debtor that "he would not be called upon to repay" the loan. *Cleary*, 565 F.2d at 47. Santiago admitted this to his accountant; Tocha stated so to the FBI. Other evidence—Santiago's unusual bookkeeping, Tocha's method of billing Castiglia for interest, Liffiton's attempt to influence Santiago's testimony—indicates a conscious effort to conceal the sham nature of the loans.

The dissent reads into precedent a non-existent distinction between "assurances by a bank officer that the [named] borrower will not be looked to for repayment because the officer will repay and a similar [situation in which an officer] gives assurances that *the bank* will not look to the borrower [were] the loan [ ] not repaid." However, knowing participation in a sham loan which could have the natural tendency to harm the bank is sufficient to find a principal liable for misapplication, *see Gens*, 493 F.2d at 222, even though mere knowledge of a nominal borrower that a transaction violates a bank rule would not support a conviction for aiding and abetting. *Docherty*, 468 F.2d at 993.

By assuring the named borrowers that they would not have to repay the loans, Castiglia manifested the criminal intent to enter into sham transactions at the risk of the bank. While the dissent believes that Castiglia's statement to Santiago that he would not be looked to for repayment "could as well describe the borrower in *Docherty*," it is significant that these words were not *ascribed* to the bank official in that case. This is the distinction that makes all the difference.

In *Docherty*, the bank official convinced a nominal borrower to obtain a loan for the benefit of the former at no risk to the bank. In contrast, Castiglia persuaded Santiago to lend his name to a similar transaction, adding the assurance that Castiglia was responsible for repayment. The natural effect of such an assurance would be to cause the named borrower to believe that he would not have to repay the loan and that, one way or another, the bank officer would discharge the obligation. This amounts to willful misapplication of bank funds.

The fact that Santiago may have believed that he would be ultimately liable in the event the note was not repaid does not absolve Castiglia of his wrongful intent when entering into the loan. Moreover, Santiago's behavior with regard to the life insurance policy and Castiglia's execution of a formal note do not suggest that Santiago intended to repay the loan. The life insurance policy hedged against one eventuality that would prevent Castiglia from repaying the debt—his death. The issuance of the promissory note, following Castiglia's resignation from the bank, was Santiago's similar attempt to bind Castiglia to his assurance of repayment. Both suggest only that Santiago sought to hold Castiglia to his promise to repay. We note that Castiglia persuaded Santiago to change his books to conceal any personal interest of Castiglia in the series of loans.

In sum, the evidence in this case demonstrates that the borrowers had been assured that Castiglia was responsible for repaying the loans.[5] The question remains whether there was an intent to injure, defraud, or deceive the bank,

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5 Moreover, we have suggested, and other Circuits have held squarely, that misapplication occurs whenever a bank officer knowingly causes a "loan to be made to his own benefit, concealing his interest from the bank." *United States v. Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); *United States v. Woods*, 877 F.2d 477, 479 (6th Cir. 1989); *United States v. Shively*, 715 F.2d 260, 265-66 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir.), *cert. denied*, 452 U.S. 943 (1981); *United States v. Krepps*, 605 F.2d 101, 106-07 (3d Cir. 1979); *United States v. Twiford*, 600 F.2d 1339 (10th Cir. 1979); *United States v. Kennedy*, 564 F.2d 1329, 1338-39 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978). The holdings in *Gens* and *Docherty* appear contrary to this line of authority. We simply note that the Third Circuit has queried whether *Gens* (and, by implication, *Docherty*) would be decided in the same way today, since in 1978 Congress severely limited the circumstances under which a bank may make loans to its officers. *Krepps*, 605 F.2d at 107 n.21; 12 U.S.C. § 375b.

the requisite *mens rea* under Section 656. *See Docherty*, 468 F.2d at 994-95. If the "natural effect" of Castiglia's conduct put BONY in jeopardy of loss, there was an intent to injure or defraud. Whether BONY suffered any actual loss is of little importance. *United States v. Clark*, 765 F.2d 297, 303-05 (2d Cir. 1985); *Cleary*, 565 F.2d at 47-48.

The bank rules that Castiglia violated were designed to protect BONY from exposure to increased pecuniary risk. Liffiton already had exceeded BONY's unsecured loan limit, yet Castiglia funnelled almost $200,000 to him. In addition, Castiglia breached bank rules and federal regulatory statutes designed to prevent bank officers from granting loans to themselves. His flouting of the safeguards necessary for BONY's security is also demonstrated by the sale of collateral pledged to another loan to pay off the $180,000 note. Evidence abounded that the natural consequence of Castiglia's deceitful and dishonest handling of bank funds was to put BONY in jeopardy of loss.

We have carefully considered appellants' other arguments and find them without merit. Accordingly, the judgments of conviction are affirmed.

WINTER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in affirming Castiglia's conviction for false statements on the bank questionnaires and in Liffiton's conviction for perjury. However, I respectfully dissent from the various convictions for conspiracy, for the misapplication of bank funds, for the making of false entries in bank records concerning the loans in question, and for aiding and abetting the misapplication and false entries.

The sole reason for my dissent is my inability to reconcile the present decision with that in *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972) (Friendly, C.J.), which reversed a conviction for aiding and abetting the misapplication of bank funds and making of false statements in factual circumstances identical to the present case. In *Docherty*, one Evans, a bank officer, persuaded a credit-worthy friend, Docherty, to obtain loans in Docherty's name from the bank to be given to Evans who promised Docherty that he, Evans, would repay them. Evans told Docherty that this arrangement was necessary because the bank would not lend its funds to an officer and frowned upon officers borrowing from other banks. Docherty gave Evans the coupon book, and Evans undertook to repay the bank directly. 468 F.2d at 991.

Docherty held that the defendant's failure to disclose the real recipient of the loan, and in one instance stating that the loan's purpose was "personal," did not violate the prohibition on false statements. *Id.* at 992. It further held that "knowledge that the proceeds of the loans were going into Evans' hands in violation of the bank's internal rules," *id.* at 993, was not enough to constitute aiding and abetting of the misapplication of bank funds, *id.* at 995. The basis for this latter holding was the majority's conclusion that there was no proof that Docherty intended to injure the bank because he "knew he was putting his own credit on the line, and it [was] not suggested that he lacked the means to repay." *Id.*

The facts in the instant case are identical. Santiago was eminently credit-worthy. He had previously borrowed millions of dollars from the bank, and Castiglia was within his authority in lending the $580,000 to Santiago on his signature. The government never suggested to the jury and

has not suggested to us that Santiago's obligation to the bank was invalid. In his summation, the prosecutor characterized the transaction as a loan by the bank to Santiago and a "reloan" by Santiago to Castiglia. *See, e.g.*, Trial Transcript at 22-66 (Sept. 20, 1988). When Santiago instructed his bookkeeper to put the note in Castiglia's file, Santiago wrote a notation on the note indicating that Castiglia was going to send a life insurance policy with Santiago as beneficiary in the amount of $580,000. Later, when his accountant indicated to Santiago that he might have insufficient documentation to hold Castiglia liable if the note was unpaid, Castiglia was made to sign a promissory note for the unpaid balance and thereafter made the payments to Santiago who passed them on to the bank. Santiago's credit was thus "on the line." *See Docherty*, 468 F.2d at 995.

The purported distinction relied upon by my colleagues is that in *Docherty* the money was "reloan[ed]" to the bank officer whereas in the instant matter the borrower was told, in the words of my colleagues, "that he would not be looked to for repayment." The same statement could as well describe the borrower in *Docherty*, who gave Evans the coupon book with the expectation that Evans would repay the bank directly. The distinction relied upon by my colleagues thus escapes me. It also escapes the government, which at trial explicitly characterized the transactions as a loan to Santiago and a "reloan" to Castiglia. Finally, the distinction escapes the accountant whose testimony is the basis for my colleagues' conclusion that Santiago was told he "would not be looked to for repayment."[1]

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1 The accountant's actual testimony was as follows:

Q. Do you recall the content of that conversation you had with Mr. Santiago on this subject?

The accountant also treated the transactions as a loan to Santiago and reloan to Castiglia and therefore caused Castiglia to sign a formal note.

Confusion is certain to emanate from the present decision. In future cases, prosecutors will avoid the word "reloan" and elicit testimony from a witness that the borrower was assured that he or she would "not be looked to for repayment." Defense attorneys will get the same witness to describe the transaction as a "reloan." Any such witness, of course, like the accountant in the instant case, will understandably and correctly believe the words to mean the same thing, but district judges will then have to charge the jury that they must convict in one case but not in the other. I shrink from speculating about the result on appeal.

The actual distinction drawn by the cases, of course, is between assurances by a bank officer that the borrower

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A. In essence, I was inquiring as to his recollection as to what had transpired, when he borrowed the money, how he did, for what purpose, general conversation to try to record the transaction.

Q. Did he respond to you?

A. Yes, he did.

Q. What did he say?

A. He asked me to contact Peter Castiglia. He borrowed the money from the bank for Peter Castiglia and he took care of all the transactions.

Q. He meaning whom?

A. Mr. Castiglia.

Q. Did he make any remark at all as to who was responsible for repayment?

A. Yes.

Q. What did he say?

A. He indicated that Mr. Castiglia was responsible.

Trial Transcript at 7-227 (Aug. 24, 1988).

will not be looked to for repayment because the officer will repay and a similar officer who gives assurances that *the bank* will not look to the borrower if the loan is not repaid. My colleagues rely heavily upon a quotation from *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974), indicating that a misapplication will be found where "bank officials assured the named debtor . . . that they would look for repayment only to the third party who actually received the loan proceeds." *Id.* at 222. However, the government never claimed in the instant case that Santiago was told, much less believed, that *the bank* would not enforce the note against him. Santiago was himself in part a money lender, and the government in no way suggests that he had, or thought he had, any defense under New York law to a suit against him by the bank if the note was not paid. Indeed, although Santiago took measures to conceal the real nature of the transaction, his behavior with regard to the life insurance policy and Castiglia's later execution of a formal note clearly indicate that Santiago believed he was liable on the note if unpaid. Indeed, the government's brief describes the cause of the execution of that note by Castiglia as follows: "Santiago now *owned* [sic] money on the other loan—and immediately looked to Castiglia for payment." (Emphasis added). Brief of Appellee at 17.

The fact that Castiglia and Santiago and Liffiton engaged in devious behavior in transferring the funds is irrelevant under *Docherty*. Santiago and Liffiton may have helped Castiglia to conceal his outside employment from the bank, but that is not enough under *Docherty* to prove an intent to injure the bank through a misapplication of funds. Judge Friendly expressly stated in that case that knowledge that a loan may violate a bank rule will not support a conviction for aiding and abetting under Section

656, 468 F.2d at 993, where the borrower puts "his own credit on the line, and it is not suggested that he lacked the means to repay," *id.* at 995.

Having said all this because I simply cannot reconcile *Docherty* and the instant case, I will confess some uneasiness with the *Docherty* holding because, as foreshadowed by Judge Lumbard's dissent, it carries with it implications for principals as well as aiders and abettors. Judge Lumbard noted in that dissent that if the borrower knows that the loan is in his name solely as a means of avoiding bank rules concerning loans to officers and if that conduct is not enough to prove an intent to injure the bank, then the officer as well as the aider and abettor will escape liability. 468 F.2d at 996-97 (Lumbard, J., dissenting). It may be, as the government has stipulated, that Santiago's wealth eliminated any practical risk to the bank in this transaction, and it may also seem harsh to charge someone who has put his own wealth at risk to the bank with criminal conduct injuring the bank. But that conduct surely facilitated a bank officer's knowing evasion of common and necessary bank rules designed to prevent misapplication of bank funds. I am thus far from certain that Castiglia has not violated Section 656 and the false entries statute in the instant case. Precedents from other circuits collected in footnote 5 of Judge Kaufman's opinion hold that such conduct by a bank officer is criminal. However, if Castiglia did violate the statute, then Santiago and Liffiton surely aided and abetted him.

Had my colleagues sought to overrule *Docherty*, either by an *in banc* decision or through our informal practice of circulation before publication to allow our colleagues to comment or seek an *in banc* ruling, *see United States v. Reed*, 773 F.2d 477, 478 n.1 (2d Cir. 1985), I might have

agreed with them on the merits. Because they have chosen to leave *Docherty* in place, with the confusion that will surely follow, I therefore have no choice but to dissent.

Because Castiglia's conviction for false statements on the bank questionnaires and Liffiton's conviction for perjury are unrelated to the ground for my dissent, I concur in their affirmance. I dissent from the convictions on the other counts for the reasons stated. A final comment on the conspiracy count is necessary. That count included: (i) Castiglia's false statements on the questionnaire; (ii) the failure to disclose Castiglia as the ultimate recipient of the loan proceeds on the loan documents, and (iii) the misapplication of bank funds. Because there were no special verdicts, we cannot tell whether the jury found that the defendants were guilty as to (i) above, a conviction I would be willing to affirm. I would therefore remand the conspiracy count for a retrial.

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit, March 20, 1990.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

OPINION ON PETITION FOR REHEARING

No. 327—August Term, 1989

(Argued November 8, 1989 Decided January 16, 1990)

Petition for Rehearing Filed January 31, 1990

Decided March 20, 1990

Docket No. 89-1207

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER J. CASTIGLIA,

Defendant-Appellant.

Before:

KAUFMAN, TIMBERS AND WINTER,

Circuit Judges.

Petition for rehearing filed by defendant-appellant Peter J. Castiglia, requesting reconsideration of panel's decision upholding his conviction for misapplication of bank funds.

Denied.

JUDITH BLAKE MANZELLA, Buffalo, New York, *for Defendant-Appellant.*

PER CURIAM:

The petition for rehearing is denied. Congressional action to restrict the circumstances under which a bank may make loans to its officers, *see* 12 U.S.C. § 375b (1988), has cast substantial doubt on whether *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972), would be decided the same way today. *See United States v. Castiglia*, No. 89-1207, slip op. at 1125 n.5 (2d Cir., Jan. 16, 1990). To whatever extent language in *Docherty* might appear to be in conflict with our decision in *Castiglia*, our current views, informed by Congressional action, control. This opinion has been circulated to all the active judges of this court prior to filing.

APPENDIX C

Order of the United States Court of Appeals for the Second Circuit, March 23, 1990.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23 day of March one thousand nine hundred and ninety

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United States Court of Appeals
FILED
Mar 23 1990
Elaine B. Goldsmith, Clerk
Second Circuit

89-1207
89-1209
89-1216

UNITED STATES OF AMERICA,

Appellee,

v.

PETER J. CASTIGLIA, JACK LIFFITON, ANTHONY SANTIAGO,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the action be heard in banc having been filed herein by counsels for the defendants-appellants, Peter J. Castiglia and Anthony Santiago and by pro-se-defendant-appellant, Jack Liffiton,

Upon consideration by the panel that heard the appeal, the petitions for rehearing were denied in an opinion issued March 20, 1990.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Supreme Court, U.S.
FILED
JUN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1660

In the Supreme Court of the United States

OCTOBER TERM, 1989

PETER J. CASTIGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a bank officer who authorized loans, the proceeds of which went to the officer rather than to the nominal borrowers, and who assured the nominal borrowers that they would not be looked to for repayment, was validly convicted of willful misapplication of bank funds under 18 U.S.C. 656.

2. Whether 18 U.S.C. 656 is impermissibly vague.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NO. 89-1660

PETER J. CASTIGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-18a, is reported at 894 F.2d 533.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1990. A petition for rehearing was denied on March 20, 1990, Pet. App. 19a-20a, and a suggestion for rehearing en banc was denied on March 23, 1990, Pet. App. 21a-22a. The petition for a writ of certiorari

was filed on April 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiracy to misapply the funds of a federally insured bank, in violation of 18 U.S.C. 371, and two substantive counts of willfully misapplying the funds of a federally insured bank, in violation of 18 U.S.C. 656. Petitioner also was convicted on four counts of making false entries in bank reports, in violation of 18 U.S.C. 1005.[1] Petitioner was sentenced to an aggregate term of two years' imprisonment. The court of appeals affirmed. Pet. App. 1a-18a.

1. Petitioner was Vice President and Senior Commercial Lending Officer at the Bank of New York, which has its headquarters in Buffalo. Dèspite internal regulations prohibiting petitioner from making personal or commercial loans to himself without bank approval, petitioner on behalf of the bank made two loans to co-defendants Anthony Santiago and Richard Tocha. The evidence at trial demonstrated that Santiago and Tocha were nominal borrowers, and that the loan proceeds actually went to petitioner and his co-defendant Jack Liffiton.

In September 1981, petitioner arranged a $580,000 loan (less prepaid interest) to Santiago. The proceeds

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[1] Three co-defendants stood trial with petitioner. Co-defendant Jack Liffiton was convicted on one count of conspiracy (18 U.S.C. 371), one count of misapplication of bank funds (18 U.S.C. 656), and one count of perjury (18 U.S.C. 1623) arising out of his false grand jury testimony concealing petitioner's status as a beneficiary of the loan. Co-defendant Anthony Santiago likewise was convicted on the conspiracy and misapplication counts, and was also convicted on a third count of making false bank entries (18 U.S.C. 1005). Finally, co-defendant Richard Tocha was acquitted on all counts. The court of appeals affirmed Liffiton's and Santiago's convictions in the same opinion that disposed of petitioner's claims.

of that loan were immediately transferred to an attorney escrow account established by petitioner's friend Dmitri Tzetzo. Tzetzo in turn directed those funds through a series of circuitous transactions to petitioner, to Geneva Lands (petitioner's wholly owned real estate holding company), and to Liffiton.[2] Santiago, the nominal borrower, received only about $3,500 of the proceeds, and he treated petitioner as the real borrower. For example, Santiago failed to deduct the substantial prepaid interest on his income tax return, he did not enter the loan on his books as was his practice with his own obligations, and he explained the omission to his accountant as reflecting that petitioner was responsible for repayment since the loan was for petitioner's benefit. In fact, Santiago did not repay the loan when it became due in June 1982. Instead, petitioner arranged for its renewal. Pet. App. 4a-5a; Gov't C.A. Br. 4-9.

Later, when petitioner became aware of a federal investigation of Geneva Lands, he quickly arranged for the $580,000 loan to be repaid. Within 48 hours petitioner convinced Tocha to borrow $400,000. That $400,000 loan was made to an entity controlled by Tocha, and the proceeds were used to repay all but $180,000 of the $580,000 loan. The $180,000 difference came from Santiago, who paid the money in return for a demand note signed by petitioner. Pet. App. 5a. Tocha invoiced petitioner for the interest payments by adding those charges to bills for construction work that Tocha performed for petitioner. Tocha also admitted in an FBI interview (although he recanted at trial) that he had been assured upon signing the $400,000 bank note that he would not be called upon to repay the

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[2] Bank rules also prohibited petitioner from authorizing more than one million dollars in aggregate unsecured loans to any one borrower. Liffiton received a total of $188,000 from the $580,000 loan despite the fact that his unsecured loans at the bank already exceeded the bank's million dollar ceiling. Pet. App. 4a.

principal or interest on that loan. Pet. App. 6a; Gov't C.A. Br. 8-11.

When Santiago's accountant learned of the original loan, Santiago said he had borrowed the money for petitioner, who had handled all the transactions and was responsible for repayment of the loan. Because the accountant was concerned about the lack of documentation on the loan, he obtained a promissory note from petitioner for $180,000. Later, petitioner substituted his holding company as the obligor on the note, giving an explanation to Santiago's lawyer and accountant that served to conceal petitioner's personal interest in the loan. Pet. App. 5a-6a.

2. The district court instructed the jury that each of the alleged crimes required proof beyond a reasonable doubt of specific intent, which the court defined as an "intentional violation of a known legal duty." 23 Tr. 30-31. The court further instructed the jury that "to misapply a bank's funds [in violation of 18 U.S.C. 656] means the unlawful taking or conversion" of bank funds by an officer for the benefit of himself or another "done willfully and with a specific intent to injure or to defraud the banks." 23 Tr. 43. Finally, the court explained that if the "loan was made to a person who [petitioner] expected could and would repay it, there was no misapplication of the bank's funds," 23 Tr. 46, but that there would be misapplication if petitioner made the loan to someone he knew did not intend to repay it regardless of that person's financial ability to repay. 23 Tr. 45.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court upheld petitioner's willful misapplication convictions, because in the court's view there was ample evidence that petitioner assured Santiago and Tocha that they would not be called upon for repayment and that there had been "a conscious effort to conceal the sham nature of the loans." Pet. App. 9a. In so ruling, the court held that a nominal borrower's creditworthiness does not preclude a willful misapplication conviction if the bank officer assures

the nominal borrow that he will not be required to repay the loan. Pet. App. 7a-9a. In the alternative, the court noted that its own precedent "suggested, and other Circuits have held squarely, that misapplication occurs whenever a bank officer knowingly causes a loan to be made to his own benefit, concealing his interest from the bank." Pet. App. 11a n.5.

Judge Winter dissented, citing as his "sole reason" an "inability to reconcile the present decision" with the Second Circuit's prior decision in *United States* v. *Docherty*, 468 F.2d 989 (1972). Pet. App. 13a. Judge Winter "confess[ed] some uneasiness with the *Docherty* holding," and indicated he might have agreed with his panel colleagues "on the merits" had they overruled that case either en banc or by circulating the opinion informally to the full court prior to publication. Pet. App. 17a-18a. Since the majority instead "chose[] to leave *Docherty* in place, with the confusion that will surely follow," Judge Winter explained that he felt he had "no choice but to dissent." Pet. App. 18a.

The panel subsequently denied rehearing. The one-paragraph *per curiam* opinion, which was circulated to all active Second Circuit judges prior to filing, stated that "[c]ongressional action to restrict the circumstances under which a bank may make loans to its officers, see 12 U.S.C. § 375b (1988), has cast substantial doubt on whether [*Docherty*] would be decided the same way today." Pet. App. 20a.[3] The court further clarified that "[t]o whatever extent language in *Docherty* might appear to be in conflict with our decision in *Castiglia*, our current views, informed by Congressional action, control." *Ibid.*

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[3] Apparently as a result of the court's citation to the 1988 version of the United States Code, petitioner mistakenly asserts that the enactment of 12 U.S.C. 375b "post-dates the conduct in this case by seven years and the indictment by three years." Pet. 7 n.*. In fact, Congress enacted the statute in 1978, three years *before* the conduct and seven years prior to the return of the indictment in this case.

ARGUMENT

1. Petitioner contends that the courts of appeals are divided on what conduct constitutes "willful misapplication" of bank funds in violation of 18 U.S.C. 656. Pet. 8-11. Contrary to that claim, it is clear that the result reached by the court of appeals in this case would be approved in all other circuits. Further review is therefore not warranted.

a. The Second Circuit held that bank funds are willfully misapplied when the defendant bank officer secretly receives the loan proceeds and assures the nominees that they will not be looked to for repayment, even if the nominal borrowers are creditworthy. Petitioner claims that *United States* v. *Gens*, 493 F.2d 216 (1st Cir. 1974), and *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972), support a contrary theory. In fact, neither case holds that the creditworthiness of a nominal borrower is an absolute shield to liability under 18 U.S.C. 656.

In *Gens*, the First Circuit expressly recognized that criminal misapplication may occur where "bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds." 493 F.2d at 222. Indeed, as the court below observed: "[I]n *Gens* the First Circuit reversed the convictions of nominee borrowers who recognized their repayment obligations, but remanded the one count involving a wealthy individual who signed his note with the understanding that he personally would not have to repay the loan, barring some 'catastrophe.' " Pet. App. 9a (quoting 493 F.2d at 220, 223). Hence, there is no conflict between the instant case and *Gens*.

Similarly, in the Second Circuit's earlier decision in *Docherty*, the defendant named debtor "knew he was putting his own credit on the line." 468 F.2d at 995. Accord *Gens*, 493 F.2d at 223 & n.15 ("[T]he key point made by [*Docherty* is] that there can be no harm to the

bank, and thus no misapplication, where the named debtor is *both* financially capable *and fully intends to repay the loan*." (Emphasis added)). Again, there is no conflict between *Docherty* and the result here because petitioner assured the nominal borrowers in this case that they would not be looked to for repayment.

b. In the alternative, the Second Circuit held that a bank officer's approval of a loan for his own benefit, while concealing his personal interest in the proceeds, constitutes willful misapplication within the meaning of 18 U.S.C. 656. It is true that, prior to this case, the Second Circuit's *Docherty* rule seemed out of step with an otherwise unbroken line of federal circuit court authority finding misapplication whenever a bank officer knowingly caused a "loan to be made to his own benefit, concealing his interest from the bank." *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969).[4] The Second Circuit in this case, however, has disavowed that aspect of *Docherty*. Pet. App. 20a. In addition, it is questionable whether the First Circuit would adhere to the position it adopted in *Gens* with respect to a bank officer's concealment of his interest in a loan in light of the 1978 enactment of 12 U.S.C. 375b, which restricts the circumstances in which a federally insured bank may make loans to its officers. See *United States* v. *Krepps*, 605 F.2d 101, 106-107 n.21 (3d Cir. 1979).

2. Nor is there any merit to petitioner's claim that 18 U.S.C. 656 is unconstitutionally vague. Pet. 8-9. Every court that has considered this argument has rejected it. See, *e.g.*, *United States* v. *Krepps*, 605 F.2d 101, 104

[4] See also *United States* v. *Woods*, 877 F.2d 477, 479 (6th Cir. 1989); *United States* v. *Shively*, 715 F.2d 260, 265-266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Steffen*, 641 F.2d 591, 597 (8th Cir.), cert. denied, 452 U.S. 943 (1981); *United States* v. *Krepps*, 605 F.2d 101, 106-107 (3d Cir. 1979); *United States* v. *Twiford*, 600 F.2d 1339 (10th Cir. 1979); *United States* v. *Kennedy*, 564 F.2d 1329, 1338-1339 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978).

n.13 (3d Cir. 1979); *United States* v. *Mann*, 517 F.2d 259, 268 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Cooper*, 464 F.2d 648, 651 (10th Cir. 1972), cert. denied, 409 U.S. 1107 (1973); *United States* v. *Fortunato*, 402 F.2d at 82.

Notwithstanding the consensus of the courts of appeals, petitioner relies upon *United States* v. *Britton*, 107 U.S. 655 (1882), for the proposition that the term "willfully misapplied" as used in an earlier version of the statute had no settled meaning. Pet. 8. In that case, however, the Court clarified that "the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association." *Id.* at 666. Accordingly, the Court held that the criminal sanction did not reach mere "acts of maladministration of the affairs of [a bank] by its officers," but instead was limited to misapplication benefiting the officer or some third party. *Id.* at 668. Consistent with *Britton*, the jury here was instructed that a "mere act of maladministration is insufficient to constitute a violation of the section." 23 Tr. 47. There was ample evidence, including the indisputable facts that petitioner personally benefited from the loans and took affirmative steps to hide his status from the bank, upon which the jury could base its verdict that petitioner acted with the necessary criminal intent.

Finally, to the extent petitioner seeks to raise a facial attack upon 18 U.S.C. 656, his claim must fail because he cannot "demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). Given the district court's detailed instructions that the jury could not convict petitioner under the statute unless he acted with specific criminal intent, see 23 Tr. 30-32, 46-47, petitioner cannot raise any colorable claim that the statute was impermissibly vague as applied to him. Cf. *Colautti* v. *Franklin*, 439 U.S. 379, 395 n.13 (1979) ("requirement of

a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid," quoting *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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